

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 303 of 1996

in

COMPANY PETITION No 88 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PREMIER AUTO ELECTRIC LTD

Versus

O.L. OF MRINAL DYEING & MFG.

Appearance:

MR PC KAVINA for Petitioner

OFFICIAL LIQUIDATOR for Respondent No. 1

MRS SWATI S SOPARKAR for Respondent No. 2, 3

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 06/02/97

ORAL JUDGEMENT

This application is filed by the complainant in
Criminal Case No.18/S and 20/S of 1996 against

Mr.Nishantrao Nahanta, Rajkumar Nahata and M/s. Mrinal Dyeing & Mfg. Co. Ltd. on the file of learned Metropolitan Magistrate 7th Court at Dadar, Mumbai under Section 446 of the Companies Act, 1956.

2. The applicant had lodged a prosecution under Section 138 of the Negotiable Instruments Act, 1881, in the court of Metropolitan Magistrate 7th Court at Dadar, Mumbai against the respondent No.3 before me namely Rajkumar Nahata and M/s. Mrinal Dyeing and Mfg. Co.Ltd. After the filing of the said prosecution, a Company Petition No. 88 of 1996 was filed in this court under Section 433 and 434 of the Companies Act and an order of winding up of the said Company which is accused No.2 before the Metropolitan Magistrate has been passed. Therefore, the present application is filed by the original complainant seeking leave of this court to continue the prosecution of the original accused.

3. The question that arises for consideration is as to whether leave to continue the said prosecution is necessary in view of the provision of Section 446 of the Companies Act. For that purpose, it is necessary to see the provision of Sub Section 1 of Section 446 which runs as under :

S.446 Suits stayed on winding up order - (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company ;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

If the above wording of the said sub section 1 of Section 446 of the Companies Act is taken into consideration, then it would be quite clear that leave of the court which passed the order of winding up of the Company is not only required for continuation of any suit, but it is also required for continuation of other "legal proceedings." The criminal prosecution would definitely amount to other legal proceeding meant by sub section 1 of Section 446. In view of the clear wording of Section 446 (1), even a criminal prosecution could not be continued without the leave of the court which has passed the order of winding up of the company. Therefore, in my opinion, for continuation of the said prosecution of criminal case No. 18/S and 20/S of 1996 in the court of learned Metropolitan Magistrate 7th Court at Dadar, Mumbai leave of this court to continue the prosecution is necessary.

4. The learned advocate for the respondent has vehemently urged before me that in the circumstances of the case, this court should not be pleased to grant any leave to the present applicant-original complainant. He submitted before me that already there is an order of winding up of the company, the continuation of prosecution of the directors of the company is not

justified. The cheques in question were issued by the accused and his company on 9th October, 1995. They were issued by them towards the outstanding debts of the Company which were outstanding for many months prior to the issuing of the said cheques, at this stage it is not possible to hold that the prosecution of the present respondent-original accused is not justified merely on the ground that the Company has been wound up. It would be open for the respondents to raise whatever contentions they want to raise regarding their liability including whether the same exists or not before the Metropolitan Magistrate. But merely because the Company has been subsequently wound up and has gone in liquidation, it is not possible for this court to hold that the continuation of the prosecution of the accused who had issued cheques towards the outstanding dues of the company is not justified. Thus, I am of the view that in view of the fact that the prosecution was lodged long before the winding up proceeding started, leave to continue of the said prosecution deserves to be granted and I therefore, grant the same.

5. It is urged before me by the learned advocate for the respondent that while granting leave the court can put certain terms. Now in view of the fact that the Official Liquidator has come in the place of the Company as an accused and as the Official Liquidator is residing in Ahmedabad and his office is also in Ahmedabad, it would be proper to transfer the said criminal prosecution in the court of Metropolitan Magistrate at Ahmedabad. But in the said prosecution, the complainant as well as the accused as they originally stood were residing in Mumbai, the Official Liquidator will come in the place of the company as an accused and the transferring of the proceeding from Bombay to Ahmedabad would cause inconveniency and hardship to the complainant as well as the other accused who are residing in Mumbai, it is not necessary to transfer the said proceeding. I will only put a condition on the complainant while granting leave to continue prosecution that if the Official Liquidator seeks an exemption from personal attendance on every date in the said criminal case, the complainant should not oppose the said claim of the Official Liquidator.

6. Thus, I hereby grant leave to the complainant M/s. Premier Auto electric Ltd. to continue the prosecution under Section 138 of the Negotiable Instruments Act in Criminal Case No. 18/S and 20/S of 1996 pending on the file of Metropolitan Magistrate 7th Court at Dadar, Mumbai. Thus, the application is finally disposed of with no orders as to costs.

* * * *